

NTSB Order No. EA-5149

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of March, 2005

Respondent.

OPINION AND ORDER

7705

Respondent was the pilot-in-command (PIC) of Midwest Express' DC-9 Flight 42 on May 6, 2002. This passenger-carrying flight departed Kansas City, MO, for Boston, MA. An FAA airworthiness inspector, Mr. Ed Carter, occupied the cockpit jump seat. At some point after the aircraft had reached cruising altitude (33,000 feet), the aircraft exhibited control problems.³ The autopilot aileron trim indicator showed full deflection while the airplane was in level flight. Respondent disengaged the autopilot and the airplane rolled to the left. He was not able to move the aileron controls. Respondent directed co-pilot Reed Mayer to try and move the aileron controls, and by applying some additional force which he described as "moderate pressure" (Transcript (Tr.) at 132), Mr. Mayer was able to free the aileron controls. He described it as the controls "popping" free. Tr. at 130. The transcript of conversations in Exhibit A-2 includes the following:

(continued...)

civil aircraft determine whether that aircraft is in condition for safe flight and discontinue a flight when unairworthy conditions occur. Section 91.13(a) prohibits careless or reckless operation of an aircraft so as to endanger the life or property of another. The section 91.13(a) charge is residual here, see Administrator's reply brief at 24-26, and carries with it no added penalty or burden of proof. Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there. Accordingly, the Administrator need not separately prove that respondent was careless or reckless; an operational violation constitutes all the proof required.

³ Paragraph 5 of the complaint states that this occurred approximately 50 miles west of Jamestown, New York. According to the transcript of conversations between the aircraft and Midwest Express dispatch and maintenance (Exhibit A-2), the aircraft was "just over Carleton VOR," which is considerably farther west of

(continued...)

Flight 42: [W]e just had a[n] aileron servo that was showing...on the autopilot it was a full deflection on the aileron. We popped the...autopilot off [and the] aircraft started to roll and we could not control it with the...ailerons....[I]t took both of us to...un-jam...the ailerons....[I]f you make a left hand turn...it isn't as responsive as it is in a turn to the right...Dispatch this is 42, we were checking something, it feels like it is getting tighter now, when we do make a right turn. We can control it at this point...but it seems like something is binding or it is, it's just a tight feel....[W]e went about 15 degrees [bank angle]. We didn't want to do anymore than that....[W]e could feel some binding or tightness...still...with the aileron.

The crew's communication with maintenance personnel located in Milwaukee, Wisconsin, led to a decision to divert the flight to Milwaukee rather than continue to Boston. At the point when the decision was made, the aircraft was flying over Lake Erie and, according to Midwest Express dispatch, was equidistant between Milwaukee and Boston. The conversation was limited to whether the crew should divert to Milwaukee, where Midwest Express's main maintenance facility was located, or continue on to Boston. The flight to Milwaukee was projected at a little over 1 hour, 15-25 minutes longer than continuing on to Boston.⁴

The crew told maintenance that it was the latter's decision, and maintenance then directed the aircraft to divert to Milwaukee.

There is no evidence of any discussion, either in the cockpit or with the maintenance or dispatch personnel on the ground, about other possible landing sites that were closer. For

(continued...)
Jamestown.

⁴ It is undisputed in the record that, from an altitude of approximately 33,000 feet, a standard descent would have taken
(continued...)

example, Detroit was much closer than Milwaukee, and was on the same heading after the flight had turned to divert to Milwaukee. There were a number of other airports with long runways within a 20-minute radius.

Milwaukee weather at the time was winds from 180° at 12 knots gusting to 17 knots with 10 miles visibility. The forecast was winds 190° at 11 knots, visibility plus 6 statute miles. Again, there is no evidence of any discussions of weather at Boston or elsewhere.⁵ The aircraft diverted to Milwaukee, in the process performing a couple of shallow (5-10 degree) heading changes that were uneventful. (Tr. at 135) The crew requested and received clearance to use a longer runway than that originally assigned, and performed shallow turns and a long final approach so that they might minimize the need for aileron inputs. Tr. at 40, 169.

Following the flight, it was determined that there was water runoff from the landing gear wheel wells that had frozen on the aileron control cable. If drain valves are clogged, water can accumulate in the wheel well, freeze, and restrict controllability of the aileron cables and, thus, the aircraft. This problem had been known to the manufacturer, which had recently issued a Service Bulletin (Exhibit R-10) directing that

(continued...)
about 20-25 minutes.

⁵ An FAA witness testified that the weather in Boston was the same or better than Milwaukee. Tr. at 46. This was the only information in the record on this point.

the slant pressure panel drain valves be checked for clogs; but the recommended maintenance had not yet been accomplished on this aircraft. An earlier Airworthiness Directive describing the underlying problems states that the freezing of water on the control cables could restrict their movement "and result in reduced controllability of the airplane." Exhibit A-6.

The law judge affirmed the Administrator's order. It is clear from his decision that the law judge placed great weight on the fact that respondent did not continue on to Boston - something he would have expected, had respondent truly believed (as he claims he did) there was no control problem. The law judge also found compelling the fact that respondent, at the time, did not know the exact nature of the control problem he was facing. That is, he knew the effects on the aircraft, but not the cause or the exact conditions. Thus, he did not know and could not know what might happen, or how the aircraft might react in different circumstances.

The law judge agreed with the Administrator that respondent was not entitled to the benefits of the Aviation Safety Reporting Program (ASRP) because his action in diverting to Milwaukee had been purposeful, not inadvertent. See FAA Advisory Circular, Exhibit A-5, page 4.

Respondent is being charged with failing to discontinue the flight when he became aware of an unairworthy condition. Given the crewmembers' own statements, including their contemporaneous reports that they "could not control [the airplane] with

the...ailerons," and of persistent "binding" and "tightness" in the aileron controls, we find that respondent no longer had adequate control over the aircraft and that the cause of this problem was unknown. The airplane, therefore, was not in a condition for safe flight. Accordingly, the aircraft had an unairworthy condition and respondent was obliged under section 91.7(b) to land as soon as practically possible (in other words, at the first location consistent with the safe operation of that aircraft; see Administrator v. Halbert, NTSB Order No. EA-3628 (1992)).

Respondent attempted to color the icing problem as a minor one of only nuisance value, but we cannot agree, nor does the evidence support such a conclusion. That the original 1985 Service Bulletin written by the manufacturer describes the matter as a nuisance is not controlling. Indeed, even were the manufacturer's characterization to be relied upon (which we do not agree it should be), the 2001-2002 Service Bulletin directing the cleaning of the drains (Exhibit R-10) is more direct: "this condition may cause restricted lateral movement during flight." We further note that the maintenance personnel involved in the discussions with the crew at no time suggested this was a minor difficulty with slant pressure panel drains; they did not appear to know what the problem was. All anyone knew was that the aileron controls became stuck, had been popped free, but were still stiff on both sides. Just as respondent, the maintenance personnel did not know what might happen.

We agree with the law judge that a key issue is what respondent thought at the time, not what he learned after the fact. If the respondent truly believed that he had adequate control of the aircraft, he would have continued to Boston. There would have been no reason not to do so. And, maintenance apparently was concerned enough to want the aircraft at its main maintenance facility.⁶ Respondent, for his part, limited turns so as to minimize the possibility of losing control of the aircraft, and he asked for a runway change at Milwaukee so that he could reduce the need for aileron use.

These reasons plus the tenor of the discussions between the crew and maintenance personnel more than convince us that respondent knew he had a control problem with the aircraft. He did not know how serious the problem was, or what it was exactly. He flew an aircraft that he knew had control difficulties, and he failed to discontinue that flight as soon as practical when the unairworthy condition occurred. Instead of getting the aircraft on the ground as soon as reasonably possible, he agreed to keep the aircraft in the air longer than it would have been had he continued on to Boston or landed at one of the other closer airports.

Finally, we would note that the redundancies in the control

⁶ The Administrator argues that diverting to Milwaukee was a financial decision. That is, it would be cheaper to repair the plane there than elsewhere and easier to rebook the passengers. However, there is no evidence to support this claim; it is merely counsel's argument.

systems discussed by respondent at the hearing are immaterial. For example, the ability independently to control the ailerons from each seat using the aileron torque tube mechanism would not have helped here; the problem was farther down the cables. There is also no showing in the evidence that this particular problem could have been overcome or mooted by one of the redundant flight control systems (and that respondent knew so).⁷ In any event, respondent did not know what was wrong with the airplane.

Respondent's claim that it was improper to charge him rather than the operator with this violation is also unavailing. Respondent is not being held accountable for the decisions of others, nor is he being held to a standard of accountability that is unreasonably high. Our decision here is inconsistent with no precedent respondent cites. See Administrator v. Naypaver, NTSB Order No. EA-4127 (1994), aff'd Naypaver v. NTSB, 44 F.3d 1005 (5th Cir. 1995).

The law judge was also correct in denying respondent the

⁷ We also find Mr. Carter's lack of worry for the safety of the flight or the controllability of the aircraft unpersuasive and unreliable as proof on these points. He lacked expertise in the subject and the aircraft and was only a private pilot. His failure to criticize or contribute to the crew's decision making or actions is not probative. Respondent is also incorrect in arguing that Mr. Carter's opinion testimony was wrongfully excluded. We use the Federal Rules of Evidence as guidance only; they are not controlling. His testimony was inappropriate expert testimony and properly excluded under the FAA's rules. But even assuming Mr. Carter's opinion testimony could properly be considered, we think the weight of the evidence would still support a finding that respondent knew or should have known his airplane had an unairworthy condition and that he was, therefore, required to land at the closest suitable airport.

benefit of sanction waiver under the ASRP. Contrary to respondent's claim, the ASRP does prohibit relief in the case of deliberate acts. Respondent's decision to divert to Milwaukee was a deliberate, purposeful act, not an inadvertent one. See Administrator v. Ferguson, NTSB Order No. EA-4457 (1996), and Administrator v. Ferguson, 3 NTSB 3068 (1980), aff'd Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 90-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.⁸

ROSENKER, Acting Chairman, and CARMODY, ENGLEMAN CONNERS, and HERSMAN, Members of the Board, concurred in the above opinion and order. HEALING, Member, did not concur, and submitted the following dissenting statement.

⁸ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).

Notation 7705

Member Healing, Dissenting:

I disagree with the findings of the ALJ in the case of Administrator v. Skoglund. Section 91.7, which respondent is charged with violating, requires that the pilot-in-command (PIC) determine whether the aircraft is in condition for safe flight or not. Captain Skoglund, as PIC, determined, after checking for controllability, that he could safely fly the plane to either Boston or Milwaukee. Subsequent to this determination, his decision to fly to Milwaukee was made, not on the basis of airworthiness, but on the preference of the Mechanical Department of the airline to have the plane in Milwaukee. The section respondent is being charged with clearly places the burden on the judgment of the pilot flying the aircraft as to its airworthiness, and much more evidence of erroneous judgment would be required to support a violation of 91.7. In addition, I attach significant credence to the testimony and report of the FAA Airworthiness Inspector who was in an official role in the cockpit during this flight, and find the FAA's apparent efforts to block his testimony questionable at best. Compared to the opinions of other witnesses who were not present in the cockpit during the flight, I strongly prefer the opinion of a professional cockpit evaluator regarding any potential violation of safety rules or proper practices. At no point was there evidence of carelessness or recklessness; and, confirming the PIC's judgement, the airplane was found to have been airworthy and safe throughout the flight.